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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD PENULIAR,

Defendant and Appellant.

G037198

(Super. Ct. No. 05WF2796)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Wendy Lindley, Judge. Affirmed.

Terrence Verson Scott, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Ronald A. Jakob and
Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Richard Penuliar was convicted of several different criminal counts, all in connection with a failed attempt to rob a 7-Eleven convenience store. On appeal, defendant raises a number of different challenges to the jury instructions, all of which we reject. We therefore affirm the judgment of conviction.

First, defendant argues the trial court should have instructed the jury regarding vicarious responsibility for a coconspirator's declarations and conduct. There was no evidence that would have supported the giving of three of the four instructions. The fourth, regarding a coconspirator's out-of-court statements to prove a defendant's guilt, was unnecessary because the trial court instructed the jury with Judicial Council of California Criminal Jury Instructions (2006-2007) CALCRIM No. 305 that defendant's coconspirator's statements could not be considered against defendant.

Second, defendant argues the trial court improperly instructed the jury regarding a firearm enhancement. We conclude the jury was properly instructed, and one immaterial phrase in the instruction did not confuse the jury or prejudice defendant.

Finally, we disagree with defendant's argument that handwritten additions to the printed form instruction of CALCRIM No. 252 made the instruction so confusing that it violated defendant's due process rights. Considering only the written version of the instructions appearing in the clerk's transcript (as we must, since the parties stipulated to relieve the court reporter of her duty to transcribe the reading of the instructions), we conclude the instruction correctly informed the jury of which charges required proof of a specific intent versus a general intent.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Michelle Bernadou was working as a clerk at a 7-Eleven store in Los Alamitos on September 23, 2005. At approximately 2:00 a.m., she stepped outside to smoke a cigarette. Bernadou noticed a car drive past. As the vehicle slowed down,

Bernadou saw the passenger look her way. The car turned right at a nearby signal, and drove out of Bernadou's sight. The car then came back, pulled into the parking lot, and parked in front of the building next door to the 7-Eleven.

Two men sat in the car for a couple of minutes, then got out of the car and approached Bernadou. She identified defendant as the passenger and Marcus Cerame as the driver. The men asked if it was a slow night, and Bernadou replied, "not really." The men then asked if the store was hiring and requested applications. Bernadou told them, "we do have job applications. I don't know if we're hiring, but I'm more than happy to give you one."

Bernadou entered the store with the men, went behind the counter, and handed the men two job applications and a pen. As Cerame filled out an application, defendant walked toward the store's office, and looked around the store. Bernadou became nervous, and told defendant and Cerame her boss was sleeping in the office. Defendant went into the store's back room and looked around.

Cerame picked up two burritos and asked Bernadou to help him operate the microwave oven. Bernadou stepped out from behind the counter and heated the burritos in the microwave. Four other customers came into the store.

Cerame placed his burritos and a Slurpee on the counter, and defendant placed a root beer and a pastry on the counter. Bernadou rang up the items while Cerame searched for his wallet. Cerame turned to defendant and said, "I don't have my wallet. Do you have any money on you?" Defendant replied, "no, I don't." Cerame said, "well, I am going to go out to my car and see if I left my wallet out there," and exited the store.

About that time, Bernadou called 911 because she was nervous. The other customers approached the counter and paid for their purchases. After those customers left, Bernadou remarked to defendant that his friend was taking a long time to find his wallet. Defendant said he was going to go outside and check on his friend.

Los Alamitos Police Officer Rick Moore responded to Bernadou's 911 call, and observed Cerame in the front passenger seat of a blue Acura Legend in the 7-Eleven's parking lot. The front passenger door was open, and Cerame's legs were sticking out of the car. Cerame appeared to be manipulating something on the floorboard of the car. Cerame looked in Officer Moore's direction, then got out of the car and walked toward Officer Moore.

Officer Moore asked Cerame, "can I ask what you're doing in the area?" Cerame did not respond, and appeared nervous. Officer Moore again asked, "what are you doing here?" Cerame again failed to respond. Officer Moore then asked Cerame to sit on the curb, and to provide identification.

After another officer arrived, Officer Moore looked inside the store. He noticed defendant standing behind a group of people. Defendant looked right at Officer Moore. When the group exited the store, defendant followed them out. Officer Moore asked defendant for identification, and he provided an identification card.

A records check revealed Cerame owned the Acura, and the car's registration was expired. Officer Moore conducted an inventory search of the car. He found a loaded .22-caliber pistol inside a black nylon bag on the passenger side floorboard, where he had earlier seen Cerame reaching. A methamphetamine pipe was located inside the glove compartment. Officer Moore also believed defendant and Cerame were under the influence of methamphetamine. Officer Moore arrested defendant and Cerame.

After being read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, 478-479 (*Miranda*), and waiving those rights, Cerame told Officer Moore he and defendant went to the 7-Eleven to buy food. Officer Moore asked Cerame how he and defendant intended to buy food when neither of them had any cash or other means to make a purchase. (Neither the inventory search of the car nor the searches of Cerame and defendant at booking revealed any cash, credit cards, checks, or anything else that could

be used to buy food.) Cerame did not initially respond, but then became emotionally upset and said, “I know I messed up.”

Defendant also waived his *Miranda* rights and told Officer Moore he and Cerame were at the store to buy food. When Officer Moore asked him how he would buy food without any money, defendant again replied, “we were there to buy food.” When asked about the gun in the vehicle, defendant told Officer Moore to check the gun for fingerprints because he had never touched it and the car was not his. Defendant admitted smoking methamphetamine three hours before being contacted by Officer Moore, but denied the pipe found in the glove compartment was his.

Defendant was charged in an information with conspiracy to commit second degree robbery (Pen. Code, §§ 182, subd. (a)(1), 211 [count 1]); second degree commercial burglary (*id.*, §§ 459, 460, subd. (b) [count 2]); having a concealed firearm in a vehicle (*id.*, § 12025, subd. (a)(1) & (b)(6) [count 3]); carrying a loaded unregistered firearm in public (*id.*, § 12031, subd. (a)(2)(F) [count 4]); being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a) [count 5]); and possession of controlled substance paraphernalia (*id.*, § 11364 [count 6]). The information also alleged as enhancements to counts 1 and 2 that defendant was vicariously armed with a firearm (Pen. Code, § 12022, subd. (a)(1)).

During trial, the parties stipulated that a blood test performed on defendant on September 23, 2005 was positive for methamphetamine. The parties also stipulated that the gun found in the Acura was not registered in the name of defendant or Cerame. A jury found defendant guilty of all counts, and found the firearm enhancements to be true.

The trial court sentenced defendant to a total of three years in state prison. The court sentenced defendant to the low term of two years on count 1, with a consecutive one-year term for the firearm enhancement. Concurrent 16-month sentences

were imposed on counts 3 and 4. The sentences on counts 2, 5, and 6, and the remaining enhancement were stayed.

DISCUSSION

I.

*THE TRIAL COURT DID NOT ERR BY FAILING TO INSTRUCT THE JURY WITH
CALCRIM NOS. 417-420 ON VICARIOUS RESPONSIBILITY
FOR A COCONSPIRATOR'S DECLARATIONS AND CONDUCT.*

Defendant argues his constitutional rights were violated because the trial court failed to instruct the jury regarding a variety of issues relating to a defendant's vicarious responsibility for a coconspirator's actions and statements. (CALCRIM Nos. 417-420.) The Attorney General argues defendant waived the issue by failing to request any of these instructions. However, the bench notes for each of these instructions state the trial court has a sua sponte duty to give the instructions if they are called for by the evidence. (See *People v. Flores* (1992) 7 Cal.App.4th 1350, 1363 [trial court has no sua sponte duty to instruct with CALJIC No. 6.15 when there is no evidence of an independent criminal act by the defendant's coconspirator; by implication, a sua sponte duty would exist if the instruction were factually supported].)

In this case, none of the instructions at issue were implicated by the evidence. CALCRIM No. 417 instructs the jury that the defendant is criminally responsible for all crimes committed by his or her coconspirators as part of the conspiracy, or which are the natural and probable consequences of the common plan or design of the conspiracy, but that the defendant is not criminally responsible for independent acts by his or her coconspirators that do not further the conspiracy's common plan, or are not the natural and probable consequences of the common plan. (*People v. Luparello* (1986) 187 Cal.App.3d 410, 437.) Defendant does not identify any criminal act by Cerame that was not a part of the conspiracy between defendant and

Cerame, or a natural and probable consequence of the conspiracy, so the trial court did not err by failing to instruct the jury with CALCRIM No. 417.

CALCRIM No. 418 instructs the jury it may not consider a coconspirator's out-of-court statement to prove the defendant's guilt unless: (1) some evidence other than the statement itself proves the existence of a conspiracy to commit a crime at the time the statement was made; (2) the coconspirator was a member of and participated in the conspiracy at the time he or she made the statement; (3) the coconspirator made the statement to further the goal of the conspiracy; and (4) the statement was made before or while the defendant was participating in the conspiracy. (*People v. Hinton* (2006) 37 Cal.4th 839, 895.) The jury was instructed with CALCRIM No. 305, which provided: "You have heard evidence that defendant Cerame & Penuliar made . . . statements (out of court/before trial). You may consider that evidence only against (him), not against any other defendant." Even if the trial court erred by failing to give CALCRIM No. 418, the error was harmless since the jury was instructed generally that Cerame's statements could not be considered against defendant.

CALCRIM No. 419 applies when the defendant joined an existing conspiracy, and instructs the jury that acts or statements by the coconspirators before the defendant joined the conspiracy cannot be considered to prove the defendant is guilty of any crimes committed before he or she joined the conspiracy. (*People v. Marks* (1988) 45 Cal.3d 1335, 1345.) Because there was no evidence defendant joined an existing conspiracy after some crime or crimes had been committed, this instruction was irrelevant and unnecessary.

CALCRIM No. 420 advises the jury the defendant cannot be guilty of conspiracy to commit crimes if he or she withdrew from the conspiracy before any overt act was committed. (*People v. Belmontes* (1988) 45 Cal.3d 744, 790-791.) Again, there was no evidence of defendant's withdrawal from the conspiracy before an overt act was

committed, and, therefore, the trial court did not err by failing to instruct the jury with CALCRIM No. 420.

II.

THE TRIAL COURT DID NOT ERR BY FAILING TO INSTRUCT THE JURY ON THE VICARIOUS LIABILITY OF AN AIDER AND ABETTOR IN CONNECTION WITH THE FIREARM ENHANCEMENT.

Defendant argues the trial court failed to properly instruct the jury regarding the firearm enhancement (Pen. Code, § 12022, subd. (a)(1).)

The jury was instructed with CALCRIM No. 3115 as follows: “If you find the defendant guilty of the crime[s] charged in Count[s] 1 & 2, you must then decide whether[, for each crime,] the People have proved the additional allegation that one of the principals was armed with a firearm during the commission of that crime. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime. [¶] A person is a principal in a crime if he or she directly commits the crime or if he or she aids and abets someone else who commits the crime. [¶] [The term firearm is defined in another instruction.] [¶] [A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [¶] A principal is armed with a firearm when that person: [¶] 1. Carries a firearm or has a firearm available for use in either offense or defense; [¶] AND [¶] 2. Knows that he or she is carrying the firearm or has it available. [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.” Defendant’s counsel did not object to CALCRIM No. 3115 while the parties were conferring about jury instructions.

Defendant argues that because the trial court did not provide the jury with an instruction defining aiding and abetting, the true finding on the firearm enhancement by the jury must be stricken. In the context of this case, the phrase “or if he or she aids and abets someone else who commits the crime” is immaterial. The jury was instructed that if it found defendant guilty of conspiracy to commit second degree robbery or second

degree commercial burglary, it should then determine whether “*one of the principals* was armed with a firearm” when committing the crime. (Italics added.) The term “principal” was further defined as, inter alia, the person who directly committed the crime. There was substantial evidence that Cerame was armed with a firearm, under the language of Penal Code section 12022, subdivision (a)(1), and that he had committed the crimes of conspiracy to commit second degree robbery and second degree commercial burglary. As a result, whatever the instructions did or did not say about aiding and abetting is immaterial in this case.

III.

THE CALCRIM NO. 252 INSTRUCTION WAS NOT SO CONFUSING AS TO VIOLATE DEFENDANT’S DUE PROCESS RIGHTS.

Defendant also argues CALCRIM No. 252, regarding proof of the union of act and intent in a case involving both general intent and specific intent crimes, erroneously described the conspiracy and burglary charges as general intent crimes. We consider only the written version of the instruction appearing in the clerk’s transcript, because the parties stipulated to relieve the court reporter of her duty to transcribe the reading of the instructions.¹

Defendant argues the use of “illegible and incomprehensible” handwritten references to the various charges against defendant made CALCRIM No. 252 a “garbled mess.”² We disagree. The version of CALCRIM No. 252 in the clerk’s transcript clearly

¹ Although defendant had the right to request the jury instructions be transcribed by the court reporter (*People v. Gloria* (1975) 47 Cal.App.3d 1, 5-6), by stipulating the court reporter be relieved of her duty to transcribe the instructions as they were read, defendant waived any claim of error on appeal (*People v. Rogers* (2006) 39 Cal.4th 826, 857; *People v. Ladd* (1982) 129 Cal.App.3d 257, 263).

² The version of CALCRIM No. 252 appearing in the clerk’s transcript reads as follows, with the handwritten portions in italics: “Every crime [or other allegation] charged in this case requires proof of the union, or joint operation, of act and wrongful intent[.] [¶] The following crime[s] [and allegation[s]] require[s] general criminal intent: count 3 – *Having a concealed firearm in veh.* count 4: *carrying a loaded [illegible word]*

states that counts 1 and 2 require a specific intent or mental state, while counts 3, 4, 5, and 6, and the enhancements require a general criminal intent. Other instructions identified the crimes with which defendant was charged by count number and with a description of the alleged crime. We look not only at the challenged instruction, but also at the jury instructions as a whole, to determine whether the instruction confuses or misstates the law, and what a reasonable juror would have understood the instruction to mean. (*People v. Cox* (1991) 53 Cal.3d 618, 667; *People v. Fonseca* (2003) 105 Cal.App.4th 543, 549.)

In this case, a reasonable juror would have been able to understand CALCRIM No. 252 to identify which charged crimes and enhancements were general intent crimes, and which were specific intent crimes. We encourage the trial courts to consider the jurors' circumstances when interlineating form instructions and to attempt to make those interlineations as legible as possible. We also caution the trial courts and counsel that the better course of action is not to relieve the court reporter of his or her duty to transcribe the reading of the jury instructions, so that, on appeal, there will be a full and complete record, should an issue regarding the instructions arise. But in this case, we conclude there was no error.

firearm in public count 5: 115[50] count 6: 113[64] enhancement <insert name[s] of alleged offense[s] and enhancement[s]>. To be guilty of these) offense[s], a person must not only commit the prohibited act but must do so intentionally or on purpose. It is not required, however, that the person intend to break the law. The act required is explained in the instruction for each crime [or allegation]. [¶] The following crime[s] [and allegation[s]] require[s] a specific intent or mental state: *ct 1 182-211 ct 2 459-460(b)* <insert name[s] of alleged offense[s] and enhancement[s]>. To be guilty of these) offense[s], a person must not only intentionally commit the prohibited act but must do so with a specific intent or mental state. The act and the intent or mental state required are explained in the instruction for each crime [or allegation].”

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.